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No. 04-922

In the Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, ET AL., PETITIONERS

v.

DEPARTMENT OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' allegations failed to satisfy the redressability requirement for Article III standing.

2. Whether petitioners had another "adequate remedy," precluding judicial review under 5 U.S.C. 704.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 90a-142a) is reported at 366 F.3d 930. A supplemental opinion of the court of appeals (Pet. App. 145a-153a) is reported at 383 F.3d 1047. The memorandum opinion of the district court (Pet. App. 1a-88a) is reported at 263 F. Supp. 2d 82.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2004. A petition for rehearing was denied on October 8, 2004 (Pet. App. 143a-144a). The petition for a writ of certiorari was filed on January 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Institutions that engage in prohibited discrimination may have their federal funding terminated. 20 U.S.C. 1682. An institution whose federal funding is terminated may obtain judicial review of the termination decision. 20 U.S.C. 1683.

Title IX states that "[n]othing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C. 1681(b). That interpretive rule is subject to the following proviso: "*Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." 20 U.S.C. 1681(b).

In 1975, following notice and comment, the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX. Those regulations provide

that a recipient "shall provide equal athletic opportunity for members of both sexes." The regulations further provide that, "[i]n determining whether equal opportunities are available the [agency] will consider, among other factors, * * * [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. 106.41(c)(1); 45 C.F.R. 86.41(c)(1). After responsibility for enforcing Title IX was transferred to the United States Department of Education, it recodified HEW's regulations without substantial change. See 45 Fed. Reg. 30,962 (1980).

In 1979, HEW adopted a policy interpretation that provided a three-part test for evaluating an institution's compliance with Title IX and HEW's regulations. Under the three-part test, an institution could demonstrate compliance in the context of athletic programs if it satisfied any one of the following prongs:

> (1) * * * intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) [w]here the members of one sex have been and are underrepresented among intercollegiate athletes, * * * the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) [w]here the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing

> practice of program expansion such as that cited above, * * * it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Pet. App. 94a-95a (quoting 44 Fed. Reg. 71,418 (1979)).

In 1996, the Department of Education clarified the 1979 Policy Interpretation. Pet. App. 173a-197a. The 1996 Clarification stated that it was not intended as a revision of the 1979 Policy Interpretation, but rather was prompted by continuing "requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics." *Id.* at 173a.

The 1996 Clarification emphasized three points. First, "[t]he Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes." Pet. App. 175a. Second, "the Clarification does not provide strict numerical formulas or 'cookie-cutter' answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law." *Id.* at 175a-176a. Third, the Clarification noted that there appeared to be some "confusion about the elimination and capping of men's teams in the context of Title IX compliance." *Id.* at 178a. The Clarification responded that "[t]he rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarifica-

tion requires that an institution cap or eliminate participation opportunities for men." *Ibid.*

2. Petitioners are several membership organizations representing the interests of collegiate men's wrestling coaches, athletes, and alumni. Pet. App. 96a. They filed suit against the Department of Education, alleging that some colleges have eliminated or reduced the size of their men's wrestling program, and that the Department of Education's enforcement policies are responsible for those actions. *Ibid.* Petitioners did not challenge either Title IX or the 1975 regulations. *Ibid.* Petitioners instead alleged that the three-part test incorporated in the 1979 Policy Interpretation and 1996 Clarification violate the equal protection component of the Fifth Amendment and Title IX. *Ibid.*

The district court granted the government's motion to dismiss for lack of Article III standing. Pet. App. 1a-88a. The court held that petitioners had not asserted any injury that would be redressed by the relief they sought. *Id.* at 53a. The district court emphasized that its ruling did not preclude judicial review of the actions of an institution that receives federal funding. Relying on *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the court held that a person subjected to discrimination on the basis of sex by a federally funded institution may seek relief against that institution under Title IX. Pet. App. 80a.

3. The court of appeals affirmed. Pet. App. 90a-122a. The court of appeals held that petitioners lack standing under Article III because they have not sufficiently alleged that their injuries would be redressed by the relief they request. *Id.* at 98a. The court concluded that while petitioners had asserted as their injury the loss of wrestling opportunities for male students, they offered

"nothing but speculation" that invalidating the 1979 Policy Interpretation and the 1996 Clarification would alter the "independent decisions" of educational institutions to eliminate or reduce the size of their male wrestling teams. *Id.* at 98a, 103a.

The court of appeals explained why petitioners' allegations amounted to nothing more than speculation. First, "nothing in the Three-Part Test requires schools to eliminate or cap men's wrestling or any other athletic program." Pet. App. 103a. Second, even if petitioners prevailed in their challenge to the 1979 Policy and the 1996 Clarification, "the 1975 Regulations would still be in place," and "[f]ederally funded schools would still be required to provide athletic opportunities in a manner that equally accommodated both genders." *Id.* at 104a. For that reason, "[s]chools would remain free to eliminate or cap men's wrestling teams and may in some circumstances feel compelled to do so." *Ibid.* That is particularly true, because "Title IX itself permits evidence of disproportion in the distribution of benefits between sexes to be considered in enforcement proceedings against recipients of federal funding." *Ibid.* Third, "other reasons unrelated to the challenged legal requirements may continue to motivate the schools to take such actions." *Ibid.* Finally, the challenged polices "are interpretive guidelines that the Department was not obligated to issue in the first place," and petitioners had provided "no basis for the notion that the Department would be required to replace the challenged policies with anything new," were the court to invalidate the existing policies. *Ibid.* In those circumstances, the court concluded that petitioners' "attempts to show redressability are based on nothing but 'unadorned speculation.'" *Id.*

at 112a (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)).

The court of appeals further held that even if petitioners had standing, "the availability of a private cause of action directly against universities that discriminate in violation of Title IX constitutes an adequate remedy that bars [petitioners'] case." Pet. App. 115a. The court relied on the provision in the Administrative Procedure Act (APA) that specifies that agency action is subject to review only when it is either "made reviewable by statute," or when "there is no other adequate remedy in a court." 5 U.S.C. 704. The court explained that there is no statute that makes the Department of Education's actions reviewable, and that a private right of action against the universities is another adequate remedy. Pet. App. 115a-117a.

Judge Williams dissented. Judge Williams concluded that petitioners had adequately alleged standing and that there was not another adequate remedy. See Pet. App. 123a-142a.

The court of appeals issued a supplemental opinion denying rehearing. Pet. App. 143a-147a. Judge Williams dissented from the denial of rehearing. *Id.* at 148a-153a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 10-19) that the court of appeals erred in holding that they lack standing under Article III. That contention is without merit. Applying settled principles of Article III standing to the circum-

stances of this case, the court of appeals correctly concluded that petitioners failed to satisfy the redressability component of Article III standing.

To establish standing under Article III, a plaintiff must allege an injury in fact that is fairly traceable to the challenged government action and that is "likely" to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Mere "speculation" that the alleged injury will be redressed by a favorable decision is insufficient to establish Article III standing. *Id.* at 561. Petitioners claim as the source of their injury that some colleges and universities have eliminated or reduced the size of their male wrestling teams. But petitioners have not sued any of the allegedly offending educational institutions under Title IX or any other source of law. Instead, they have sued the United States Department of Education, claiming that the Department's Title IX enforcement policies against the universities and colleges are responsible for their alleged injury.

Because petitioners' alleged injury arises from the government's regulation of a third party not before the Court, the redressability component of standing is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). In that context, standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ibid.* (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989)), "and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to * * * permit redressability of injury." *Ibid.*

The Court's decision in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), illustrates the difficulty of making that showing. In *Simon*, organizations representing low income persons denied access to nonprofit hospitals challenged an Internal Revenue Service ruling that allowed favorable tax treatment to nonprofit hospitals that offered only emergency care to indigent persons. The Court held that the plaintiffs lacked standing to challenge the IRS's ruling because it was speculative whether a decision withholding tax exempt status from hospitals that failed to provide non-emergency service to indigent persons would cause the hospitals to provide such service. *Id.* at 43. Similarly, in *Allen* v. *Wright*, 468 U.S. 737 (1984), the Court held that parents of black public school children lacked standing to challenge the IRS's failure to withdraw tax exempt status from racially discriminatory schools. The Court concluded that it was entirely speculative whether withdrawal of a tax exemption would lead the school to change its policies. *Id.* at 739-740.

Petitioners failed to sufficiently allege standing under those decisions. As the court of appeals concluded, petitioners failed to show that there is a "substantial probability" (*Warth* v. *Seldin*, 422 U.S. 490, 504 (1975)), that a decision invalidating the 1979 Policy and the 1996 Clarification would likely lead universities and colleges to alter their independent decisions to eliminate or reduce the size of men's wrestling programs.

Several considerations support that conclusion. First, nothing in the 1979 Policy Interpretation or the 1996 Clarification requires institutions to eliminate or reduce the size of male sports teams or to adopt any one approach to compliance. They allow universities and

colleges to select their own preferred method of compliance.

Second, even if the 1979 Policy Interpretation and the 1996 Clarification did not exist, Title IX regulations that petitioners have not challenged would still require universities that receive federal funds to select sports in such a way as to "effectively accommodate the interests and abilities of members of both sexes." 45 C.F.R. 86.41(c)(1); 34 C.F.R. 106.41(c)(1). In order to satisfy that unchallenged obligation, universities may choose to eliminate or cap men's sport's teams, just as they have done in the past. That is particularly true because Title IX expressly permits the Department of Education to consider as relevant evidence of a Title IX violation that an "imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." 20 U.S.C. 1681(b).

Third, a college or university may choose to eliminate or reduce the roster size of particular athletic squads for any number of reasons wholly unrelated to Title IX. Such factors could include budgetary constraints, inadequate facilities, insufficient spectator interest, or the lack of suitable competition. In this respect, the failure of the colleges and institutions themselves to mount a similar challenge suggests that Title IX and the policy statements are not the sole factors contributing to changes in athletic programs. Finally, the 1979 Policy Interpretation and the 1996 Clarification are interpretive guidelines that the Department was not obligated to issue, and petitioners have not suggested any basis for requiring the Department to replace those policies with anything new that would affect the independent decisions of colleges and universities.

Petitioners failed to adduce anything substantial to counter those considerations. As the court of appeals observed, for example, petitioners "do not suggest that any particular school necessarily would forego elimination of a wrestling team or reinstate a previously disbanded program" in the absence of the agency guidance they challenge, except to say that a school "might" do so. Pet. App. 103a. Rather, as the court of appeals further explained, petitioners offered "nothing but unadorned speculation to suggest that the schools covered by Title IX would change their decisions if appellants were to prevail in this case." *Id.* at 110a-111a. In these circumstances, the court of appeals correctly concluded that petitioners failed to satisfy the redressability element of Article III standing. In any event, that case-specific and fact-bound question does not warrant review.

2. Petitioners next contend (Pet. 19-30) that the court of appeals erred in holding that review is unavailable under 5 U.S.C. 704. Because petitioners lack standing, however, that question is not properly presented here. For that reason alone, review of that question is not warranted.

Even if that issue were properly presented, it would not warrant review. The APA provides for judicial review of agency action that is "made reviewable by statute" and final agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704. As the court of appeals concluded, neither of those grounds for review is available here.

First, this is not a case in which "there is no other adequate remedy in a court." 5 U.S.C. 704. Under *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), petitioners have a private right of action against colleges and universities that engage in discrimination in viola-

tion of Title IX, and because petitioners challenge the 1979 Policy Interpretation and the 1996 Clarification on the ground that they violate the Equal Protection Clause and Title IX itself, that right of action is an "adequate remedy" for the discrimination alleged by petitioners here. The D.C. Circuit has repeatedly reached that conclusion in analogous contexts. See *Washington Legal Found.* v. *Alexander*, 984 F.2d 483 (D.C. Cir. 1993); *Women's Equity Action League (WEAL)* v. *Cavazos*, 906 F.2d 742 (D.C. Cir. 1990); *Council of & for the Blind* v. *Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (en banc).

Nor is this a case in which agency action is "made reviewable by statute." 5 U.S.C. 704. In arguing otherwise, petitioners rely (Pet. 19) on 20 U.S.C. 1683, which provides that agency action under Title IX "shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." As the court of appeals explained, however, "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions *other than the APA* that govern judicial review of those actions." Pet. App. 117a. Section 1683 is not such a statute. Instead, it contemplates review under the APA when there is no other adequate remedy, a precondition that petitioners have failed to satisfy.

Petitioners similarly err in arguing (Pet. 22-25) that they can circumvent the APA's judicial review provisions by adding as defendants the Secretary and Assistant Secretary of Education in their official capacities. See Pet. 22. In the context of a suit challenging action taken by an administrative agency, a suit against a government officer in his official capacity is simply "another

way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). Accordingly, in the context of this case, a suit against the Secretary and the Assistant Secretary is simply another way of suing the Department of Education. As such, such a suit is subject to the limitations for review of agency action set forth in 5 U.S.C. 704. Where, as here, there is another adequate remedy, such a suit may not be brought.

Finally, petitioners assert (26-30) that a private right of action against recipients that discriminate is not an adequate remedy. But after careful consideration of that issue, the court of appeals concluded otherwise, Pet. App. 118a-119a, and that fact-bound conclusion does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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